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on behalf of himself and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO**

DARREN MULLER on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

PARK MANAGEMENT CORP. dba SIX
FLAGS DISCOVERY KINGDOM a
California corporation; and DOES 1
through
50, inclusive,

Defendants.

Case No. FCS054401
ASSIGNED FOR ALL PURPOSES TO:
JUDGE: Hon. Wendy Getty
DEPT: 8

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; [PROPOSED] ORDER**

Date: March 29, 2022
Time: 9:00 a.m.
Dept.: 8

*[Declaration of James R. Hawkins filed
concurrently herewith]*

PLEASE TAKE NOTICE THAT on March 29 , 2022 in Department 8 of the above-entitled court located at 580 Texas St., Fairfield, CA 94533, Plaintiff Darren Muller (“Plaintiff”) will and hereby does move the Court for an Order (1) provisionally certifying the Class for Settlement purposes only; (2) provisionally approving James Hawkins and Isandra Fernandez from the law firm of James Hawkins, APLC, as counsel for Plaintiff and the proposed Class Members in this matter, (3) provisionally approving Darren Muller as the Class Representative; (4) approving ILYM, Inc. as the Settlement Administrator; (5) preliminarily approving the class action settlement of background and credit check claims; and (6) approving and directing distribution of the Notice of Class Action Settlement.

This Motion is made pursuant to Rule 3.769 of the California *Rules of Court*, which provides for court approval of the settlement of a purported class action and allows the Court to preliminarily certify a class for settlement purposes. The basis for this Motion is that the proposed Settlement is fair, adequate, and reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity of proposed Class Members to participate in, opt out of, or object to the Settlement.

This Motion will be based on the Memorandum of Points and Authorities included herein, the Declaration of James R. Hawkins, the Stipulation and Settlement of Class and Representative Action attached to the Declaration of James R. Hawkins as Exhibit A, and upon the oral arguments of counsel (should there be any) and upon the complete records and file herein.

DATED: March 8, 2022

JAMES HAWKINS APLC

By: 
James R. Hawkins
Isandra Y. Fernandez
Kacey E. Cook
Attorneys for Plaintiff
Darren Muller

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On January 13, 2020, Plaintiff Darren Muller (“Muller”) filed this wage and hour class
4 action (“Lawsuit” or “Action”) on behalf of himself and all employees employed by, or formerly
5 employed by Park Management Corp dba Six Flags Discovery Kingdom., (hereinafter
6 “Defendant” and/or “Six Flags”) (Plaintiff and Defendant collectively referred to as “Parties”)
7 who occupied non-exempt hourly positions in the state of California (“Class Action Complaint”).
8 The Lawsuit seeks recovery of alleged unpaid wages, premium wages and penalties pursuant to
9 California Labor Code, California Industrial Welfare Commission (“IWC”) Wage Order No.7-
10 2001, Bus. & Prof. Code § 17200 and also alleged that Defendant Six Flags (“Defendant”)
11 improperly conducted employee background checks without providing the proper disclosures and
12 obtaining authorization in violation of the Fair Credit Reporting Act (“FCRA”), Investigative
13 Consumer Reporting Agencies Act (“ICRAA”) Consumer Credit Reporting Agencies Act
14 (“CCRAA”) (hereinafter “background check claims). The action further seeks an award of
15 attorneys’ fees, interest and costs. Six Flags denies the claims alleged and disputes any liability
16 for the damages sought.

17 However, Plaintiff Muller has joined a prior filed action, styled *Walker v. Six Flags*
18 *Entertainment Corporation – Solano County Case No. FCS05070*, with respect to the wage and
19 hour claims only. The *Walker* matter has settled and motion for preliminary approval is pending.
20 The *Walker* complaint has been amended to include Plaintiff Muller in that Action. In this Action,
21 Plaintiff Muller has filed a Request for Dismissal of the labor code claims so that only the
22 background check claims alleged in this matter remain.

23 Subject to Court approval, the Parties have reached a settlement of the background check
24 claims asserted on behalf of himself and the proposed class members in this Lawsuit for a total of
25 Two Hundred Twenty Thousand Dollars (\$220,000) (hereinafter “Class Settlement Amount” or
26 “CSA”), which includes the individual settlement payments to the proposed class members, class
27 representative enhancement payment to Plaintiff, claims administration costs to the claims
28 administrator, and attorneys’ fees and costs (the “Settlement”). **This is a cash settlement.** Every

1 proposed Class Member who does not opt out of the Settlement will automatically be mailed an
2 individual settlement payment. There is no claims filing process, and proposed Class Members do
3 not have to file a claim to be mailed a payment.

4 As discussed more thoroughly below, the proposed Settlement satisfies all of the criteria
5 for preliminary settlement approval under California law and falls well within the range of proper
6 approval. As such, Plaintiff moves this Court to: (i) provisionally certify the proposed Settlement
7 Class; (ii) provisionally approve James Hawkins and Isandra Fernandez from the law firm of
8 JAMES HAWKINS, APLC as class counsel for Plaintiff and the Class in this matter; (iii)
9 provisionally approve named Plaintiff Darren Muller as the class representative; (iv) appoint
10 ILYM, Inc. as the settlement administrator; (v) grant preliminary approval of the Stipulation and
11 Settlement of Class and Representative Action (hereinafter “Settlement Agreement”); (vi) direct
12 distribution of the Notice of Class Action Settlement on the terms and conditions set forth in the
13 Settlement Agreement; and (vii) schedule a final approval hearing.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 On February 21, 2020, Plaintiff Darren Muller (“Muller”) initiated this action in the
16 Superior Court for the County of Solano on behalf of himself and all others similarly situated,
17 styled *Darren Muller v. Park Management Corp.* Solano County Superior Court Case No.
18 FCS054401 (the “Lawsuit”). The Complaint asserts causes of action for; (1) failure to pay lawful
19 wages including overtime wages; (2) failure to provide lawful meal periods or compensation in
20 lieu thereof; (3) failure to pay timely wages; (4) knowing and intentional failure to comply with
21 itemized employee wage statement provisions; (5) violation of 15 USC §1681(b) *et seq.* in
22 conducting employment related background checks (6) violation of California Civil Code §1785
23 *et seq.* in conducting employment related background check; (7) Violation of California Civil
24 Code §1786 *et seq.* in conducting employment related background check and; (8) violations of the
25 unfair competition law (Bus. & Prof. Code § 17200 *et seq.*) (the “Action”). (See Declaration of
26 James R. Hawkins “Hawkins Decl.” ¶ 2.)

27 On April 30, 2020, Defendant provided Plaintiff with a notice of the related case *Walker*
28 *v. Six Flags Entertainment Corporation* – Solano County Case No. FCS050707 (“Hawkins Decl.”)

¶ 3.) Subsequently, counsel for Muller and counsel for Walker entered into a joint prosecution agreement which includes this matter (*Id.*). Thereafter, the Six Flags and Walker parties attended a private mediation and reached a settlement of the wage and hour class action and PAGA claims in *Walker*. Plaintiff Muller is included in the *Walker* settlement and has released his wage and hour claims against Six Flags (“Hawkins Decl.” ¶ 4.) The only claims that remain in the instant action are Plaintiff’s background check claims against Defendant (*Id.*) As such, Plaintiff brings this action pursuant only to Labor Code §1024.5, 15 USC §1681(b) *et seq.*, California Civil Code §1785 *et seq.*, §1786 *et seq.* seeking statutory damages and/or actual damages, and reasonable attorneys’ fees and costs.

Throughout this litigation, Defendant has denied Plaintiff’s allegations and raised defenses to the claims, individually and on a representative basis. (Hawkins Decl. ¶ 5.) Defendant maintains that its employment policies and practices regarding employee background checks meet the requirements of the United States Code and California Civil Code. (*Id.*)

To date, no motion for class certification has been filed, no class has been certified and the Court has not made any findings that Six Flags engaged in any wrongdoing or in violation of any state law, rule, or regulation, with respect to the issues presented in the litigation. (Hawkins Decl. ¶ 6.)

Through informal discovery, Plaintiff and Six Flags have exchanged documents and information related to the claims asserted (Hawkins Decl. ¶ 7.) Defendant has produced documents regarding the background checks of putative class members. (*Id.*) Defendant also provided Plaintiff with class data and information regarding the number of putative class employees during the relevant time period (*Id.*)

After conducting informal discovery, exchanging relevant information and engaging in numerous discussions regarding the claims alleged, on July 21, 2021, the parties participated in a private mediation with Jeffrey Krivis. (Hawkins Decl. ¶ 8.) During the course of the mediation, the parties exchanged further information and documentation concerning Plaintiff’s claims and Six Flags’ defenses thereto, and aggressively advocated for their respective positions. (*Id.*)

At the conclusion of the mediation, the parties reached a settlement of this Action for a

1 maximum settlement amount of \$220,000. (Hawkins Decl. ¶ 9.) Thereafter, the Parties exchanged
2 multiple drafts of the proposed settlement agreement and class notice documents and engaged in
3 communications regarding the settlement terms (*Id.*) The final terms and provisions of the
4 settlement agreement were approved and executed by all the parties on or about December 28,
5 2021. (Hawkins Decl. ¶ 10; Exhibit A- Settlement Agreement).

6 Based on their own respective independent investigations and evaluations and after taking
7 into account the sharply disputed factual and legal issues involved in this matter, the risks
8 attending further prosecution, the informal discovery and investigation conducted to date,
9 Plaintiff and his counsel are of the opinion that settlement for the consideration and on the terms
10 set forth in the Settlement Agreement is fair, reasonable and adequate and is in the best interests
11 of the named Plaintiff and proposed Class Members. (Hawkins Decl. ¶ 11.)

12 **III. SUMMARY OF SETTLEMENT TERMS**

13 **A. Class Members**

14 The Parties request the Court certify a class (the “Settlement Class” or “Class Members”) as follows for the purpose of this Settlement. “Settlement Class” is defined as: All persons who
15 applied to work for Defendant and/or all persons who are or were employed by Defendant in the
16 state of California during the Class Period and were subjected to Defendants’ employment-related
17 background check and/or credit procedures including, but not limited to, executing employment-
18 related background check and/or credit documents (Settlement Agreement p.5 ¶ G.) The Class
19 Period means the period from February 21, 2015, through October 1, 2021. (Settlement
20 Agreement p.5 ¶ H.)

22 **B. Allocation of the Class Settlement Amount**

23 1. The total maximum value of settlement is \$220,000.00 to be paid by Defendant in
24 full satisfaction of all claims arising from the Action. The Class Settlement Amount (“CSA”) is
25 available to pay (a) all settlement payments; (b) the Class Representative enhancement award; (c)
26 Settlement Administrator Costs; and (d) Class Counsel’s fees and costs; (Settlement Agreement
27 p.6 ¶ J.)

28 2. Subject to Court approval, the law firm of James Hawkins, APLC shall be

1 paid an amount not to exceed \$73,333.33 attorneys' fees (i.e., 1/3 of the Class Settlement
2 Amount) and litigation costs not to exceed \$15,000 (Settlement Agreement, p. 3 ¶ B.)

3 3. Subject to Court approval, \$5,000 shall be paid to the Named Plaintiff,
4 Joseph Lloyd, for his time and effort pursuing the Action (Settlement Agreement p. 5 ¶ I.)

5 4. The Settlement Administrator will be paid for the reasonable costs of
6 administration, currently estimated to be \$48,000.00. Costs needed in excess of that amount and
7 approved by the Parties' counsel shall be taken out of the Class Settlement Amount (Settlement
8 Agreement p. 4 ¶ D.)

9 5. Payment to Class Members shall be calculated and apportioned from the Net
10 Settlement Amount based on each Class Member's pro-rata share of the Net Settlement Amount.
11 Each Class Member is entitled to an equal share of the Net Settlement Amount (Settlement
12 Agreement p. 14 ¶ VII(1).) The Net Settlement Amount means the portion of the Class Settlement
13 Amount remaining after deduction of the approved Class Representative Enhancement Payment,
14 Claims Administration Costs, and the Attorneys' Fees and Costs. (Settlement Agreement p. 7 ¶
15 N.)

16 6. Settlement Payments shall be allocated as follows for tax purposes: all
17 Individual Settlement Payments will be allocated as no-wages. Because there are no wage claims
18 asserted, no withholdings shall be made on the Individual Settlement Payments. The Settlement
19 Administrator shall report the Individual Settlement Payments on an IRS Form-1099 as required
20 by law (Settlement Agreement p. 19, ¶ XI.)

21 7. This is a non-reversionary settlement with no reversion to Six Flags. To the
22 extent that an Individual Settlement Payment check is (1) undeliverable, or (2) uncashed 180 days
23 after the date listed on the check, the check shall become null and void, and any monies
24 remaining in the distribution account shall be distributed to the Controller of the State of
25 California to be held pursuant to the Unclaimed Property Law, California Civil Code §1500 et
26 seq., for the benefit of those Settlement Class members who did not cash their checks, until such
27 time that they claim their property (Settlement Agreement p. 18, ¶ X (2).)

28 **C. Released Claims Summary**

1 1) Release by Settlement Class Members

2 “Released Parties” means Defendant and each of its past, present and future agents,
3 employees, servants, officers, directors, members, owners (whether direct or indirect), general
4 partners, limited partners, trustees, representatives, shareholders, stockholders, mortgagees or
5 ground lessors, attorneys, parents, subsidiaries, equity sponsors, related and/or affiliated
6 companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, insurers,
7 consultants, joint venturers, joint employers, alleged joint employers, dual employers, alleged
8 dual employers, temporary staffing agencies, contractors, affiliates, service providers, alter-egos,
9 alleged alter-egos, co-employers, alleged co-employers, vendors, employee benefit plans and
10 fiduciaries thereof, affiliated organizations, and any person and/or entity alleged to have joint
11 liability, and all of its respective past, present and future employees, directors, officers, members,
12 owners, agents, representatives, payroll agencies, attorneys, stockholders, fiduciaries, parents,
13 subsidiaries, other service providers, and assigns and any and all persons acting under, by,
14 through or in concert with any of them, and each and all of them (Settlement Agreement pp. 9-10,
15 ¶¶ V, W).

16 “Released Claims” means, of the date of the Order Granting Final Approval, all Class
17 Members shall fully and finally release Released Parties of the Released Claims which include,
18 but are not limited to, all claims asserted in the Action, arising from or related to the facts and
19 claims alleged in the Action, that could have been alleged in the Action, and/or based on the facts
20 and claims asserted, arising from or related, or could have been alleged in the operative
21 Complaint, as amended, during the Class Period. The Released Claims include any and all claims
22 regarding background checks and/or credit checks, to include but not limited to, violations of the
23 Fair Credit Reporting Act, violations of the Investigative Consumer Reporting Agencies Act,
24 violations of the Consumer Credit Reporting Agencies Act; the California Private Attorneys
25 General Act of 2004 (PAGA); California Business and Professions Code section 17200, *et seq.*
26 and 17208, *et seq.*, and any and all claims arising under 15 U.S.C. § 1681; California Labor Code
27 sections 432, 432.5 and 1024.5; all claims arising under the California Labor Code relating to the
28 Released Claims; California Civil Code sections 1785 *et seq.*, 1785.1 *et seq.*, and 1786 *et seq.*; all

1 claims arising under the California Civil Code relating to the Released Claims; all claims arising
2 under federal common law; and all claims arising under the California common law of contract
3 (Settlement Agreement p.10, ¶ V).

4 The release here is a common type of release found in class action settlements. This type
5 of release has been approved in both state and federal courts. (*Villacres v. ABM Industries, Inc.*
6 (2010) 189 Cal.App.4th 562, 586 [“the weight of authority establishes that ... a court may release
7 not only those claims alleged in the complaint and before the court, but also claims which ‘could
8 have been alleged by reason of or in connection with any matter or fact set forth or referred to in’
9 the complaint”]; *Hesse v. Sprint Corp.* (9th Cir. 2009) 598 F.3d 581, 591 [“a state court’s
10 approval of a settlement agreement could release not only the state law fraudulent billing claims
11 before it, but also federal RICO claims arising from the same billing practices”].)

12 Likewise, it is perfectly permissible for releases to release more than simply the named
13 defendant in the class action. (See, e.g., *Villacres*, 189 Cal.App.4th at p. 573 [enforcing a class
14 action settlement that released the named defendant and “its affiliates, subsidiaries, parent,
15 successors-in-interest, and assigns, and all of their present, former and future offices, directors,
16 shareholders, employees, agents, attorneys, insurers, and representatives ...”]; *Reyn’s Pasta*
17 *Bella, LLC v. Visa USA, Inc.* (9th Cir. 2006) 442 F.3d 741, 748 [“A class settlement may also
18 release factually related claims against parties not named as defendants”].) Indeed, a class action
19 settlement would have little value to the settling defendant if, minutes after the settlement
20 agreement obtained final court approval, the plaintiff could simply turn around and sue the
21 defendant’s officers, directors, employees or agents for the same alleged wrongful acts. (*Wal-*
22 *Mart Stores, Inc. v. Visa U.S.A. Inc.* (2nd Cir. 2005) 396 F.3d 96, 106 [“Broad class action
23 settlements are common, since defendants and their cohorts would otherwise face nearly limitless
24 liability from related lawsuits”].)

25 2) Plaintiff’s Released Claims

26 Upon the Effective Date, the Class Representative shall be deemed to have fully, finally,
27 and forever released the Released Parties from all Released Claims in addition to any and all
28 claims known or unknown, at law or in equity, which she may have against Defendant through

1 the date of execution of the Settlement Agreement and to have expressly waived and relinquished,
2 to the fullest extent permitted by law, the provisions, rights, and benefits they may otherwise have
3 had relating to the released claims pursuant to Section 1542 of the California Civil Code
4 (Settlement Agreement pp.8-9, ¶ S).

5 **D. Notice Procedure**

6 Subject to Court approval, within twenty-one (21) calendar days of Preliminary Approval,
7 Defendant will provide the Class List to the Claims Administrator. Within fourteen (14) calendar
8 days after receiving the Class List from Defendant, the Claims Administrator will mail a Notice
9 Packet to all Class Members. Prior to mailing, the Claims Administrator will search the National
10 Change of Address Database for information to update the addresses. (Settlement Agreement
11 p.15, ¶ VIII 2, 3.)

12 Any Notice Packet returned as non-deliverable, the Settlement Administrator will
13 promptly conduct further data searches and, for each search that results in a corrected address,
14 shall promptly re-mail the Class Notice to the Class Member. Class Members who received a re-
15 mailed notice shall have their Response Deadline extended to the later of fifteen (15) calendar
16 days from the re-mailing or the original Response Deadline (Settlement Agreement p. 15, ¶ VII
17 (4)). Class Members will also have an opportunity to dispute the information provided in their
18 Notice Packets and object to or request exclusion from the Class Settlement (Settlement
19 Agreement pp. 11 ¶ X.)

20 **IV. CALIFORNIA RULES OF COURT § 3.769 APPROVAL PROCESS**

21 A class action may not be dismissed, compromised or settled without approval of the
22 Court. (*Wershba v. Apple Computer, Inc.*, (2001) 91 Cal. App. 4th 224, 240; Cal. Rules of Court,
23 Rule 3.769.) The approval or rejection of the proposed settlement is committed to this Court's
24 sound discretion. (*Wershba*, 91 Cal. App. 4th at 234-235.) A court's decision to approve a class
25 action settlement may be reversed only upon a strong showing of "clear abuse of discretion."
26 (*Class Plaintiffs v. City of Seattle*, (9th Cir. 1992) 955 F.2d 1268, 1276.) The purpose of the
27 court's preliminary evaluation of the proposed settlement is to determine whether it is within the
28

1 “range of reasonableness” and thus, whether the notice to the class is appropriate. (NEWBERG,
2 §11.25 at 11-36-37.)

3 According to this procedure, Plaintiff requests this Court to provisionally certify the
4 proposed class for settlement purposes – conditional upon final approval of the settlement. The
5 practical purpose of provisional class certification is to facilitate distribution to all Class Members
6 of notice of the terms of the proposed Settlement and the date and time of the final approving
7 hearing. Additionally, Plaintiff requests this Court to preliminarily approve the Settlement as fair,
8 adequate and reasonable as set forth below.

9 **V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE**

10 The law favors settlement, particularly in class actions and other complex cases in which
11 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
12 (*City of Seattle* 955 F.2d at 1276; *Potter v. Pacific Coast Lumber Company*, (1951) 37 Cal. 2d.
13 592, 602-603.; 4 NEWBERG § 11.41.) To grant preliminary approval of this class action
14 settlement, the Court need find only that the settlement falls within the “range of reasonableness.”
15 (*North County Contractor’s Ass. Inc. v. Touchstone Ins. Svcs.*, (1994) 27 Cal. App. 4th 1085,
16 1089-1090.) In determining whether a class settlement is fair, adequate, and reasonable, courts
17 must consider the following relevant factors: the strength of the plaintiff’s case, the risk, expense,
18 complexity and likely duration of further litigation, the risk of maintaining class action status
19 through trial, the amount of offered settlement, the extent of discovery completed and the range of
20 the proceedings, and the experience and views of counsel. (*Dunk v. Ford Motor Co.*, (1996) 48
21 Cal. App. 4th 1794, 1801; *Clark v. American Residential Services, LLC*, (2009) 175 Cal. App.
22 4th. 785,799.) The list of factors is not exclusive, and the court is free to engage in a balancing
23 and weighing of the factors depending on the circumstances of each case.” (*Clark*, 175 Cal. App.
24 4th at 799; *Wershba*, 91 Cal. App. 4th at 245.)

25 Furthermore, courts must give “proper deference to the private consensual decision of the
26 parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement
27 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
28 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion

1 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
2 adequate to all concerned.” (*Hanlon v. Chrysler Corp.*, (9th Cir. 1998), 150 F.3d 1011, 1027.)

3 **A. The Terms of the Proposed Settlement are Fair**

4 A preliminary review of the terms of the Settlement Agreement provides no reason to
5 doubt its fairness. A presumption of fairness exists where: 1) the settlement is reached through
6 arms-length negotiations; 2) investigation and discovery are sufficient to allow counsel and the
7 court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of
8 objectors is small. (*Dunk v. Ford Motor Co.*, *supra*, at 1802.) The first three of these factors apply
9 at the preliminary approval stage; the percentage of objectors is determinable only at the final
10 approval stage.

11 1. The Settlement Was Reached Through Extensive Arm’s Length Bargaining
12 and Based on the Recommendation Proposed by the Mediator

13 As already discussed herein, the Parties have conducted themselves in informed, good
14 faith arm's-length negotiations after exchanging extensive information about the claims and
15 defenses of this lawsuit and engaging in pre-mediation and post mediation discussions aimed at
16 settling their dispute. In attempts to settle this lawsuit, the Parties participated in a full day
17 mediation with Jeffery Krivis (Hawkins Decl. ¶ 8.) In sum, armed with all of the relevant
18 information and with the help of an experienced mediator, counsel for the parties participated in
19 lengthy, serious and informed negotiations which has resulted in the proposed Settlement
20 Agreement that is now placed before this Court.

21 2. Investigation and Discovery Were Sufficient For the Parties to Evaluate the
22 Risks Intelligently

23 Plaintiff has conducted significant investigation of the facts and law both before and after
24 the Action was filed. Plaintiff’s counsel reviewed voluminous supporting documents provided by
25 Defendant in exchanges of information in preparation for mediation. (Hawkins Decl. ¶¶ 7-9).

26 3. Plaintiff’s Counsel is Experienced in Similar Litigation

27 Moreover, counsel for Plaintiff has represented, mediated and settled other employee class
28 actions in wage and hour litigation and have knowledge of the strengths and weaknesses of the

claims against Six Flags and the benefits of the proposed Settlement under the circumstances of the case. (Hawkins Decl. ¶ 12, 13).

B. The Settlement Provides for Reasonable Compensation to Class Members

Even without the presumption of fairness and reasonableness, the Settlement clearly is within the range of reasonableness. Plaintiff's claims are premised on allegations that Defendants required Plaintiff and Class Members to sign documents purporting to provide disclosure and authorization for Defendants to perform a background check and obtain consumer credit reports. One notice/authorization form is titled "Background Authorization/Release Form Consumer Notification" which is embedded with extraneous information, fails to provide all the requisite information and contains a liability waiver. The other form is titled "Fair Credit Reporting Act Disclosure & Authorization" which Plaintiff contends is non-compliant in that the form fails to mention who the reporting agency is or how to contact them and, as explained further below, contains non-compliant extraneous information (Hawkins Decl. ¶ 14.)

The predominant claims in this action arise from alleged violations of the Fair Credit Reporting Act ("FCRA") with respect to the employment related background checks conducted by Defendant. Specifically, Plaintiff alleges that Defendants improperly conducted background checks and obtained consumer credit reports on Plaintiff and Class Members when they applied for employment in violation of 15 USC §1681 *et seq.* (Hawkins Decl. ¶ 15.)

The FCRA prohibits an employer from obtaining a consumer report unless:
(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer [i.e., the employee or job applicant] has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by [the employer].

15 U.S.C. §1681b(2)(A).

The FCRA disclosures must be "in a document that consists solely of the disclosure." *Syed v. M-I, LLC*, 853 F. 3d. 492, 496 (9th Cir. 2017). In *Syed*, the FCRA disclosure contained a term purporting to waive any liability of the employer related to the background check. *Id.* at 498. The Ninth Circuit held that under the plain language of the FCRA that the required disclosure

1 must be in “a document that consists solely of the disclosure,” the inclusion of the liability release
2 was impermissible. Further, the FCRA’s disclosure requirements do not allow for the inclusion
3 of any extraneous information in the consumer report disclosure, even if such information is
4 related to the disclosure *Gilberg v. California Check Cashing Stores, LLC*, 913. F. 3d. 1169,
5 1175-76 (9th Cir. 2019). The FCRA expressly states that the *sole* additional element that may be
6 included with the disclosure is an authorization, “which authorization may be made on the
7 document referred to in clause (i). . . .” 15 U.S.C. §1681b(b)(2)(A)(ii).

8 Moreover, in *Walker v. Fred Meyer, Inc.* 953 F.3d 1082, 1084 (9th Cir. 2020), the Ninth
9 Circuit held that a background check disclosure form violates the FCRA’s standalone requirement
10 if it contains any extraneous information beyond the disclosure required by the FCRA. However,
11 the court also ruled that “some ‘concise explanation’” may be included in the disclosure such as
12 what a consumer report entails, how it will be obtained and what type of employment purposes it
13 could be used for.

14 A plaintiff may be entitled to statutory and punitive damages when a defendant has
15 willfully violated the provisions of the FCRA. 15 U.S.C. § 1681n(a)(1)(A): “any person who
16 willfully fails to comply with any requirement imposed under this subchapter with respect to any
17 consumer is liable to that consumer in an amount equal to the sum of . . . damages of not less than
18 \$100 and not more than \$1000 . . . such amount of punitive damages as the court may allow.”

19 Six Flags vehemently disputes Plaintiff’s claims and maintains that it complied with the
20 disclosure requirements under the FCRA and/or California law. Specifically, Defendant
21 contends that the “Fair Credit Reporting Act Disclosure & Authorization” form complies with
22 the requirements of the FCRA in that the document consists solely of the FCRA required
23 disclosure and an authorization for the employee to execute. Furthermore, Six Flags contends
24 that Plaintiff would be unable to show any recognizable injury. Plaintiff disagrees and
25 contends that the form contains verbiage regarding adverse decisions that may be taken by
26 Defendants based on the consumer reports and rights pertaining to the same which is the type
27 of extraneous information which the *Walker* court concluded may pull the applicant’s attention
28 away from the privacy rights protected by the FCRA (Hawkins Decl. ¶ 16.)

1 Moreover, Defendant contends that Plaintiff will not prevail on the “willfulness”
2 requirement as it complied with the FCRA requirement based on the law that existed at the time
3 Defendant provided the disclosure documents to Plaintiff and Class Members. *Mitchell v. WinCo*
4 *Foods, LLC* (9th Cir 2020) 828 Fed. Appx.467 (Hawkins Decl. ¶ 17.)

5 District court decisions have indicated that the minimum \$100 statutory damages is the
6 proper comparator in standalone disclosure cases. See e.g. *Lagos v Leland Stanford Junior*
7 *University* (N.D. Cal. 2017) 2017 WL 1113302 *4. Based on documents and information
8 produced by Defendant, in preparation for mediation and during settlement negotiations, the
9 number of employee background check conducted by Six Flags is Four Thousand Six Hundred
10 Twenty (4,620) (Hawkins Decl. ¶ 18.) Therefore, Plaintiff’s counsel estimated a maximum of
11 statutory damages under the FCRA of \$462,000, if liability were proven. However, taking into
12 consideration Defendant’s defenses and the willfulness requirement of this statute, for settlement
13 purposes Plaintiff’s counsel reduced this amount to \$220,000 (*Id.*)

14 Moreover, even without the reduced valuation for settlement purposes, here, the \$220,000
15 settlement amount for a class of approximately 4,620 equates to an estimated \$47.61 per class
16 member. Multiple courts have approved FCRA stand-alone disclosure settlements, as is this one,
17 where the settlement amounts are comparable to, or less than the estimated individual settlement
18 amounts in this case. District courts have approved FCRA standalone disclosure settlements where
19 the settlement amounts are comparable to the estimated individual settlement amounts in this case.
20 See *Aceves v. Autozone Inc.* (C.D. Cal. Mar. 25, 2016) NO. 5: 14—CV-2032, ECF No. 41
21 (preliminary approval motion pending in settlement with gross recovery of \$20 per class member
22 in the disclosure class); *Esomou v. Omnicare* (ND. Cal. 2018) 2018 WL 3995854 (net
23 settlement amount of \$16.50 per class member); *Schofield v. Delta Airlines* (N.D. Cal. 2019)
24 2019 WL 955288 (gross settlement amount of \$52 per person.)

25 Plaintiff also brought claims based on the California statutes: the Investigative Consumer
26 Reporting Agencies Act, Civil Code section 1786, *et seq.* (“ICRAA”) and Consumer Credit
27 Reporting Agencies Act, Civil Code section 1785, *et seq.* (“CCRAA”). Plaintiff’s claims under
28 ICRAA are premised on the same facts alleged in support of the FCRA. However, Defendant

1 argues that under ICRAA, statutory damages are not available on a class wide basis and Plaintiff
2 cannot allege specific facts to substantiate his claim an investigative consumer report was
3 obtained for him. Thus, for purposes of settlement, this claims was given a value of \$0 (Hawkins
4 Decl. ¶ 19.)

5 Plaintiff also contends that Defendant violated CCRAA by unlawfully attempting to
6 obtain a credit check on Plaintiff and proposed Class Members for employment purposes. As per
7 Lab. Code §1024.5, Plaintiff and Class Members are not within the category of employees for
8 whom an employer or prospective employer may use a consumer credit report for employment
9 purposes. Defendant disputes this claim and contends it did not obtain any consumer credit
10 reports. Thus, for purposes of settlement, this claim was also valued at \$0 (Hawkins Decl. ¶ 20.)

11 In sum, through his counsel, Plaintiff took into consideration the significant risks that even
12 if class certification were granted, a merits decision would not favor the Class. Plaintiff has
13 considered the expense and length of continued proceedings necessary to continue the Action
14 against Six Flags through trial and any possible appeals. Plaintiff is also aware of the burdens of
15 proof necessary to establish liability for the claims asserted in the Action, Six Flags' defenses
16 thereto, and the difficulties in establishing Plaintiff's damages (Hawkins Decl. ¶ 21.)

17 The proposed Settlement requires Defendant to pay each proposed Class Member who
18 does not opt out a portion of the Net Settlement Amount as specifically set forth in the Settlement
19 Agreement. The amount to be paid to the Class is undoubtedly fair, adequate, and reasonable
20 especially in light of the significant risk to Plaintiff and proposed Class Members in continuing
21 with the litigation and not prevailing on class certification or at trial (Hawkins Decl. ¶¶ 22.)

22 For all the foregoing reasons, the proposed Settlement Agreement is fair, adequate, and
23 reasonable, and is in the best interests of the proposed Class Members.

24 **C. The Class Representative Payment and Class Counsel Fees Are Reasonable**
25 **and Should be Awarded**

26 The Settlement Agreement provides for an award to be paid to the proposed Class
27 Representative. The primary purpose is to provide Plaintiff Darren Muller an enhancement
28 payment, taking into consideration the risks, time, effort, and expenses incurred by him in coming

1 forward to provide invaluable information and negotiate and litigate this matter on behalf of all
2 Class Members. (Hawkins Decl. ¶ 23.) Plaintiff has actively participated in this litigation by
3 providing significant supporting documents and information and assisting counsel in developing
4 information necessary to litigate and settle this case which has resulted in a favorable settlement
5 for the putative Class Members. (*Id.*) Thus, the payment of \$5,000.00 to the Class Representative
6 represents a small portion of the aggregate settlement amount and should be awarded.

7 Further, as will be discussed in more detail in Plaintiff’s motion for final approval of the
8 Settlement, class counsel fees in the amount of \$73,333.33 is reasonable within California’s
9 standard benchmark and well within the range customarily approved by the California courts in
10 comparable class actions.

11 **VI. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE**

12 In addition to such terms as class definition, settlement amounts and payment procedures,
13 the Settlement Agreement reached between the Parties contains a provision to which the Parties
14 stipulate to the Court's provisional certification of the Class, but do so for the purposes of this
15 settlement only. Plaintiff now requests this Court to provisionally certify the Class.

16 It is well established that trial courts should use a lower standard for determining the
17 propriety of certifying a settlement class, as opposed to a litigation class. (*Dunk v. Ford Motor*
18 *Co.*, (1996) 48 Cal.App.4th at 1794, 1807, fn. 19.) Under California law, a class action is
19 appropriate when the Class is ascertainable and there is a “well defined community of interest in
20 the questions of law and fact affecting the parties to be represented.” (Code Civ. Proc., §382;
21 *Dunk*, 48 Cal. App. 4th at 1806.) State law requirements under *California Code of Civil*
22 *Procedure* section 382 for class certification largely mirrors *Federal Rules of Civil Procedure*
23 Rule 23 – namely, numerosity and typicality of the class representative’s claims, adequacy of
24 representation, predominance of common issues and superiority. As discussed below, although
25 Defendant adamantly disputed and continues to dispute Plaintiff’s ability to certify a litigation
26 class, all of the requirements of certification for settlement purposes are met for the proposed
27 settlement Class.
28

1 **A. The Proposed Class is Ascertainable**

2 Here, the proposed class is ascertainable because all of the proposed Class Members
3 are/were subjected to background check as part of their employment with Six Flags . The
4 proposed Class Members have been identified through Defendant’s employee and personnel files.
5 (*See Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932 [“Class Members are
6 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by
7 reference to official records”].)

8 **B. Numerosity of the Class is Sufficient**

9 If the class is sufficiently large that joinder of all members is impractical or that individual
10 joinder is impractical, the numerosity requirement is met. (*Hebberd v. Colgrove* (1972) 28
11 Cal.App.3d 1017, 1030.) Here, the proposed class consists of approximately 4,620 members,
12 consisting of current and former employees of Defendant. Therefore, joinder of individual claims
13 would be impractical and the numerosity requirement is met.

14 **C. There are Common Questions of Law and Fact to the Class**

15 Commonality is met if there are common questions of fact and law to the class. (*Hanlon v.*
16 *Chrysler Corp.* 150 F.3d at 1019 [“The existence of shared legal issues with divergent legal
17 factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal
18 remedies within the class”].) Here, Plaintiff alleges that the proposed Class Members’ claims all
19 stem from the same alleged conduct. Specifically, Plaintiff alleges that Six Flags violated United
20 States Code and California Civil Codes by improperly conducting background checks and
21 obtaining consumer credit reports on Plaintiff and proposed Class Members when they applied for
22 employment. Plaintiff and the proposed Class Members he seeks to represent request all available
23 remedies including statutory damages and/or actual damages, attorneys’ fees, and costs. Although
24 Defendant disagrees with Plaintiff’s contentions for purposes of certifying a litigation class, for
25 purposes of a settlement class, these circumstances create questions of law and fact common to all
26 proposed Class Members.

1 **D. The Typicality Requirement is Met**

2 The typicality requirement is met if the claims of the named Class Representative are
3 typical of those of the class, though “they need not be substantially identical.” (*Hanlon* 150 F.3d
4 at 1020.) Factual differences may exist between the Class and the Class Representative(s) so long
5 as the claims arise from the same events or course of conduct and are based on the same legal
6 theories. (*Id.*) Here, the claims of the Class Representative are typical of the other proposed Class
7 Members because they arise from the same factual basis and are based on the same legal theories
8 as those applicable to all proposed Class Members. (*Wherner v. Syntex* (N.D. Cal. 1987) 117
9 F.R.D. 641, 644.) Thus, for purposes of a settlement class, the typicality requirement is met.

10 **E. The Adequacy Requirement is Met**

11 If the named representative and his or her counsel have no interests adverse to the interest
12 of the proposed Class Members and are committed to vigorously prosecuting the case on behalf
13 of the class, then the adequacy requirement is met. (*McGhee .v Bank of America*, (1976) 60 Cal.
14 App. 3d 442,450.) Here, under the proposed settlement, the Class Representative will receive a
15 reasonable award for their time and efforts assisting counsel with factual issues surrounding the
16 case and risk incurred in bringing this action on behalf of the proposed Class Members. Other
17 than this specific payment, all proposed Class Members will receive payment calculated and
18 apportioned from the Net Settlement Amount based on each Class Member’s pro-rata share of the
19 Net Settlement Amount (*Hanlon* 150 F.3d at 1020.)

20 Any Class Member who requests to be excluded from the Settlement Agreement will not
21 be entitled to any recovery under the Settlement Agreement and will not be bound by its terms or
22 have any right to object, appeal or comment on it. Nothing in this Settlement Agreement can be
23 construed as a waiver of any defense that Defendant or the Released Parties have or could assert
24 against anyone who timely serves a Request for Exclusion. As a result, there is no conflict of
25 interest between the Class Representative and the proposed Class Members. Additionally, the
26 Class Representatives and their counsel have been committed to prosecuting this action on behalf
27 of the Class.

1 **F. Common Issues Predominate and Class-wide Settlement is Superior to Other**
2 **Available Methods of Resolution**

3 Class certification is authorized where common questions of law and fact predominate
4 over individual questions and where class-wide treatment of a dispute is superior to individual
5 litigation. (*Richmond v. Dart Industries, Inc.*, (1981) 29 Cal.3d 462, 469.) The test is whether the
6 proposed class is sufficiently cohesive to warrant adjudication by representation. (*Hanlon, supra*,
7 at p. 1022.) Plaintiff contends that the proposed Class in this case is sufficiently cohesive, since
8 all proposed Class Members share a “common nucleus of facts and potential legal remedies.”
9 Specifically, all of the proposed Class Members and the proposed Class Representative seek
10 compensation for improperly conducted background and/or credit checks upon application for
11 employment, as well as statutory damages and/or actual damages, attorneys’ fees and costs for the
12 allegations described herein; common questions about such unlawful background and credit
13 checks on proposed Class Members and the resultant damages, predominate over individual
14 questions, and the proposed Class Members’ potential legal remedies are identical. (*Id.*) Although
15 Defendant disagrees with Plaintiff’s contentions, it has agreed the Class may be certified for
16 settlement purposes only.

17 Additionally, particularly in the settlement context, class resolution is superior to other
18 methods for the fair and efficient adjudication of the controversy. (*Hanlon*, 150 F. 3d at p. 1023;
19 *Dunk, supra*, 45 Cal. App. 4th at p. 1087.) The superiority requirement involves a “comparative
20 evaluation of alternative mechanisms of dispute resolution.” (*Hanlon, supra*, at p. 1023.) Here,
21 the alternative methods of resolution are a plethora of individual claims from potentially over 115
22 plaintiffs. The class action device can thus conserve judicial resources by avoiding the waste and
23 delay of repetitive proceedings and prevent inconsistent adjudication of similar issues and claims.
24 (*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 Cal. 4th 319, 340; *Bell v Farmers Ins.*
25 *Exchange* (2004) 115 Cal.App.4th 715, 741.) Therefore, settlement on a class-wide basis is
26 superior.

1 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

2 The Notice is attached as Exhibit 1 to the Settlement Agreement. The Notice provides the
3 requisite, pertinent information to Class Members and the options available to them. Should a
4 Class Member wish to exclude themselves from the Settlement, they can send a request for
5 exclusion to the settlement administrator. Should a Class Member wish to object to the
6 Settlement, they can object as described in the Notice. If a Class Member does nothing in
7 response to the Notice, the Class Member will be mailed an individual settlement payment.

8 **A. The Class Notice Satisfies Due Process**

9 California statutory and case law vests the Court with broad authority to fashion an
10 appropriate notice process. (Cal. Rules of Court 3.760 *et seq.*) A proposed method of notice of a
11 proposed settlement is fair, adequate and reasonable if it has “a reasonable chance of reaching a
12 substantial percentage of the Class Members. (*Cartt v. Superior Court*, (1975) 50 Cal. App. 3d
13 960, 974.) The Notice plan described herein entails mailing the Notice to all known and
14 reasonably ascertainable proposed Class Members based on Defendant’s payroll records and
15 provides for a reasonable chance of reaching a significant percentage of Class Members. (See
16 section III (D) herein.) Further, such individual notice by first class mail is routinely approved as
17 consistent with due process. (See, *e.g.*, MANUAL at §§21.311, 21.312; Wright & Miller, Fed.
18 Practice & Procedure §1797.6 [“Of course, notice by mail to all of the identified Class Members .
19 . . will suffice.”] (citing cases).) The Notice is consistent with the class certification notices
20 approved by numerous state and federal courts and is the best notice practicable under
21 circumstances of this case.

22 **B. The Proposed Class Notice is Accurate and Informative**

23 Not only is the manner of the proposed notice proper, so too is the content of the said
24 notice. The proposed notice provides information on the meaning and the nature of the proposed
25 settlement, the terms and provisions of the settlement, the relief the settlement will provide the
26 proposed Class Members, the application of Plaintiff’s counsel for reimbursement of costs and
27 attorneys’ fees from the settlement amount, the date, the time and place of the Final Fairness and
28 Approval Hearing, and the procedure and deadlines for opting out of the Settlement or for

1 submitting comments and objections. (Cal. Rule of Court 3.769(f).)

2 The Notice also fulfills the requirement of neutrality in class notices. (2 NEWBERG
3 §8.39.) It summarizes the proceedings to date and the terms and conditions of the settlement in an
4 informative and coherent manner, in compliance with the MANUAL’S statement, “the notice
5 should be accurate, objective, and understandable to class members.....” (MANUAL at §30.21.)
6 The Notice clearly states the settlement does not constitute an admission of liability by Six Flags
7 and recognizes the Court has not ruled on the merits. It also states the final settlement approval
8 decision has yet to be made. Accordingly, the Notice complies with the standards of fairness,
9 completeness and neutrality required of a settlement class notice disseminated under the authority
10 of the Court. (F.R.C.P. 23(c)(2).)

11 Moreover, the Notice comports with CA Rules of Court, Rule 3.766(d). As per Rule
12 3.766, the contents of the Notice providing for an opt out procedure for the class members must
13 include the following:

- 14 (1) A brief explanation of the case, including the basic contentions or denials of
15 the parties;
- 16 (2) A statement that the Court will exclude the member from the class if the
17 member so requests by a specified date;
- 18 (3) A procedure for the member to follow in requesting exclusion from the class;
- 19 (4) A statement that the judgment, whether favorable or not, will bind all members
20 who do not request exclusion; and
- 21 (5) A statement that any member who does not request exclusion may, if the
22 member so desires, enter an appearance through counsel.

23 The Notice contains the information required under Rule 3.766(d). (See Ex. 1 attached to
24 Settlement Agreement.)

25 **VIII. CONCLUSION**

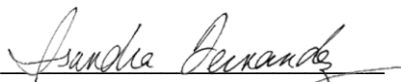
26 Based on the foregoing, Plaintiff respectfully requests that the Court enter the Proposed
27 Order Granting Preliminary Approval submitted concurrently herewith, and thus:
28

1. Grant preliminary approval of the Settlement Agreement, and certify the Settlement Class for the purposes of settlement only;
2. Confirm named Plaintiff Darren Muller as the Class Representative and James R. Hawkins and Isandra Fernandez of the law firm of JAMES HAWKINS, APLC as Class Counsel;
3. Approve and appoint ILYM, Inc. as Settlement Administrator;
4. Enter an Order preliminarily approving the proposed settlement and approving the Notice; and
5. Schedule the Final Approval Hearing Date on _____, 2022; (to be determined by the Court at the hearing for preliminary approval of settlement.

Respectfully submitted,

Dated: March 8, 2022

JAMES HAWKINS, APLC



James R. Hawkins, Esq.
Isandra Y. Fernandez, Esq.
Kacey E. Cook, Esq.
Attorneys for Plaintiff
Darren Muller

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On March 8, 2022, I served on the interested parties in this action the following document(s) entitled:

**DECLARATION OF JAMES R. HAWKINS IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

[XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from the email address jocelyn@jameshawkinsaplc.com to the persons at the e-mail addresses listed in the Service List below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Please See Attached Page

Executed on March 8, 2022, at Irvine, California.


Jocelyn Mateo

1 Jason W. Kearnaghan, Esq.
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[http://www.dir.ca.gov/Private-Attorneys-
General-Act](http://www.dir.ca.gov/Private-Attorneys-General-Act)

(via LWDA Website)